Supreme Court, U.S.
FILED

(1)

95 1342 FEB 15 1996

No. _____ OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1995

FRED MEYER, INC., a Delaware corporation,

Petitioner,

v.

WILLIAM CASEY, HERB L. GRAY, KEN BENJAMIN, MIKE WILEY, LON MABON, PHILLIP Z. RAMSDELL, NO SPECIAL RIGHTS COMMITTEE, OREGON CITIZENS ALLIANCE, JOHN DOES 1 through 50, and JANE DOES 1 through 50,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Charles F. Hinkle*
*Counsel of Record
STOEL RIVES LLP
900 SW Fifth Avenue, Ste. 2300
Portland, OR 97204-1268
Telephone: (503) 224-3380
Counsel for Petitioner

February 15, 1996

---

69 pp

QUESTIONS PRESENTED

1. In Oregon, statutes and state constitutional amendments are frequently proposed by initiative petition and enacted by popular vote. When sponsors of initiative petitions enter private property without the owner's permission to solicit signatures, and they make that entry under authority granted to them by the state constitution, are they acting "under color of" state law, within the meaning of 42 U.S.C. § 1983?

2. When the owner of a single, free-standing retail store is compelled by the State to allow initiative petitioners to stand next to the entrances of the store in order to promote a particular viewpoint on a controversial political issue, has the State violated the owner's First Amendment rights?

3. When the owner of a single, free-standing retail store is compelled by the State to allow initiative petitioners to use its property for the purpose of soliciting signatures for their petitions, has the State effected a taking of the owner's property without just compensation?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE PETITION 9

I. The Ninth Circuit's Holding that Initiative Petitioners Are Not State Actors Is Contrary to This Court's Precedents and Conflicts with a Ruling of the Court of Appeals for the District of Columbia Circuit. It Effectively Prevents Fred Meyer from Obtaining a Federal Court Adjudication of its Federal Constitutional Rights. 9

II. No State, Other Than Oregon, Has Required the Owner of a Single, Free-Standing Store to Provide a Forum for Initiative Petitioners. In Imposing that Requirement, the Oregon Courts Have Misread This Court's *PruneYard* Opinion and Violated Fred Meyer's Rights Under the Free Speech Clause of the First Amendment and the Takings Clause of the Fifth Amendment. 16

CONCLUSION 25

APPENDIX A-1

OPINION (Ninth Circuit Court of Appeals, dated October 10, 1995) A-1

OPINION (District Court, dated January 10, 1992) A-25

ORDER (Ninth Circuit Denial of Rehearing, dated November 17, 1995) A-35

TABLE OF AUTHORITIES

Cases — Page

Alliance for Community Media v. F.C.C., 56 F.3d 105 (D.C. Cir. 1995), *cert granted*, 116 S.Ct. 471 (1995) 13, 15

Cohen v. Cowles Media Co., 501 U. S. 663 (1991) . . . 14

Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) 25

Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) . 10, 11

Judlo, Inc. v. Vons Companies, Inc., 211 Cal.App. 3d 1020, 259 Cal. Rptr. 624 (1989) . . . 16

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) . . 13

Lloyd Corporation v. Whiffen, 315 Ore. 500, 849 P.2d 446 (1993) 8, 11

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 12, 13, 19, 22

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 22-24

OEA v. Roberts, 301 Ore. 228, 721 P.2d 837 (1986) . . 11

Pacific Gas & Elec. v. P.U.C. of California,
475 U.S. 1 (1986) 17, 18

PruneYard Shopping Center v. Robins,
447 U.S. 74 (1980) 16-18, 20-22, 24

San Francisco Arts & Athletics, Inc. v.
United States Olympic Comm., 483 U.S. 522 (1987) . . 13

Smith v. Allwright, 321 U.S. 649 (1944) 9, 11

State v. Cargill, 100 Ore. App. 336, 786 P.2d 208
(1990), *aff'd by an equally divided court*,
316 Ore. 492, 851 P.2d 1141 (1993) 7, 8, 14

Terry v. Adams, 345 U.S. 461 (1953) 10, 13

United States v. Classic, 313 U.S. 299 (1941) . . 9, 10, 15

Statutes and Regulations

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 1

Ore. Admin. Rules 165-14-005 to 165-14-090 11

Ore. Rev. Stat. chapter 250 11

Ore. Rev. Stat. § 250.085 12

Ore. Rev. Stat. §§ 164.205(3), 164.245 7

Ore. Rev. Stat. §§ 250.035, 250.065 11

Constitutional Provisions

Oregon Constitution, Article IV, section 1 . . . . . 2, 7

United States Constitution, Fifth Amendment . . 2, 12, 14, 16, 17, 19

United States Constitution, First Amendment . . 16, 17, 19

PETITION FOR WRIT OF CERTIORARI

Petitioner Fred Meyer, Inc. respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 67 F.3d 1412 (1995), and is reprinted in the appendix, p. A-1, *infra*. The opinion of the United States District Court for the District of Oregon is reported at 781 F. Supp. 1511 (D. Or. 1993), and is reprinted in the appendix, p. A-25, *infra*.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 10, 1995. (A-3.) Petitioner's Petition for Rehearing was denied in an Order filed November 17, 1995. (A-35.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides in pertinent part as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state ***, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof

> to the deprivation of any rights, privileges, or immunities served by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. ***."

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in part:

> "*** [N]or shall private property be taken for public use, without just compensation."

Article IV, section 1 of the Oregon Constitution provides, in part:

> "(1) The legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives.
>
> "(2)(a) The people reserve to themselves the initiative power, which is to propose laws and amendments to the Constitution and enact or reject them at an election independently of the Legislative Assembly.
>
> "(b) An initiative law may be proposed only by a petition signed by a number of qualified voters equal to six percent of the

total number of votes cast for all candidates for Governor at the election at which a Governor was elected for a term of four years next preceding the filing of the petition.

"(c) An initiative amendment to the Constitution may be proposed only by a petition signed by a number of qualified voters equal to eight percent of the total number of votes cast for all candidates for Governor at the election at which a Governor was elected for a term of four years next preceding the filing of the petition.

"(d) An initiative petition shall include the full text of the proposed law or amendment to the Constitution. A proposed law or amendment to the Constitution shall embrace one subject only and matters properly connected therewith.

"(e) An initiative petition shall be filed not less than four months before the election at which the proposed law or amendment to the Constitution is to be voted upon.

"(3)(a) The people reserve to themselves the referendum power, which is to approve or reject at an election any Act, or part thereof, of the Legislative Assembly that does not become effective earlier than 90 days after the end of the session at which the Act is passed.

"(b) A referendum on an Act or part thereof may be ordered by a petition signed by a number of qualified voters equal to four percent of the total number of votes cast for all candidates for Governor at the election at which a Governor was elected for a term of four years next preceding the filing of the petition. A referendum petition shall be filed not more than 90 days after the end of the session at which the Act is passed.

"(c) A referendum on an Act may be ordered by the Legislative Assembly by law. Notwithstanding section 15b, Article V of this Constitution, bills ordering a referendum and bills on which a referendum is ordered are not subject to veto by the Governor.

*****

"(5) The initiative and referendum powers reserved to the people by subsections (2) and (3) of this section are further reserved to the qualified voters of each municipality and district as to all local, special and municipal legislation of every character in or for their municipality or district. The manner of exercising those powers shall be provided by general laws, but cities may provide the manner of exercising those powers as to their municipal legislation. In a city, not more than 15 percent of the qualified voters may be

> required to propose legislation by the initiative, and not more than 10 percent of the qualified voters may be required to order a referendum on legislation."

STATEMENT OF THE CASE

Petitioner Fred Meyer, Inc. ("Fred Meyer") operates retail stores for the sale of groceries, apparel, and household and variety items in seven western states. Approximately 40 of its stores are in Oregon. Without exception, Fred Meyer stores in Oregon are freestanding, single buildings, situated on property owned or leased by the company. None of them is located in a large regional shopping center. They have no auditoriums, gardens, fountains, malls, skating rinks, or any other facilities that can be used by the public to congregate or assemble. Fred Meyer invites the public to enter its premises for one purpose only: to buy the products it offers for sale.

The process of making laws by way of initiative petition and popular vote was made a part of the Oregon Constitution in 1902. In every general election year since 1904 (except 1966), measures have been placed on the ballot by initiative petition, proposing new statutes or constitutional amendments. To place a measure on the statewide ballot, its sponsors must obtain the signatures of the number of voters equal to six percent (for a statute) or eight percent (for a constitutional amendment) of the total number of votes cast for Governor in the preceding election.

Fred Meyer, like the owners of other freestanding retail stores in Oregon, has never permitted initiative

petitioning on its premises. In recent years, initiative petitioners have insisted upon the right to use Fred Meyer's property, without its permission, to solicit its customers to sign their petitions. Unlike large, multiple-tenant shopping centers, Fred Meyer stores have no central mall or other common area, and when initiative petitioners appear at Fred Meyer stores, they station themselves immediately outside the main entrances.

The company's experience has been that the presence of initiative petitioners at the entrances to its stores discourages a significant number of customers from patronizing its stores. It has received a large number of customer complaints about the presence of such petitioners, many asking why the company supports a particular cause by allowing its proponents to use its property to gather signatures. Initiative petitions in Oregon typically address extremely emotional and divisive issues (initiative proposals relating to abortion, the death penalty, obscenity, assisted suicide, equal rights for gay and lesbian persons, and welfare reform have all appeared on the Oregon ballot in recent years). Fred Meyer wishes to attract customers who may have strong feelings on all sides of these controversial issues, or who may simply wish to do their grocery shopping without being importuned to sign a political petition. Fred Meyer wants to be known as a good place to buy bread and light bulbs and socks, not as a forum for political activity, and it does not wish to have its name associated with the controversial issues that are the subject of the typical initiative petition in Oregon.

Respondents in this case were the proponents of two initiative petitions aimed at restricting "gay rights." In

December 1991, they entered the premises of several Fred Meyer stores, without the company's permission, stationed themselves immediately outside the main entrances to the stores, and began soliciting signatures from Fred Meyer customers. Their presence elicited hundreds of customer complaints and threats to boycott Fred Meyer stores as long as the petitioners were present at the stores. Fred Meyer personnel therefore directed respondents to leave Fred Meyer's property, and they refused to do so.

A refusal to leave premises that are open to the public after being "lawfully directed" to do so is a criminal trespass in Oregon. Ore. Rev. Stat. §§ 164.205(3), 164.245. Respondents contended that these statutes did not apply to them, because Article IV, section 1 of the Oregon Constitution gave them a right to use Fred Meyer's property for their petitioning purposes. That section says nothing about creating a right to enter private property for petitioning purposes. Nevertheless, in 1990 the Oregon Court of Appeals held, in a criminal trespass case involving six initiative petitioners who refused to leave the premises of a Fred Meyer store, that the right to gather signatures on private property that is open to the public is "implicit" in Article IV, section 1. *State v. Cargill*, 100 Ore. App. 336, 786 P.2d 208 (1990), *aff'd by an equally divided court*, 316 Ore. 492, 851 P.2d 1141 (1993). The court in that case reversed the trespass convictions of the six petitioners, holding that Fred Meyer's directive to them to leave its premises was not "lawful" because that directive violated their "implicit" constitutional right to carry out their petitioning activity on Fred Meyer's property.

When the respondents in this case entered Fred Meyer's property in late 1991 to carry out their petitioning activity, therefore, Fred Meyer was unable "lawfully" to direct them to leave, because the State of Oregon, in its Constitution as construed in *Cargill*, compelled Fred Meyer to provide a forum for them.[1]

---

[1] Three years after the Oregon Court of Appeals decided *Cargill*, the Oregon Supreme Court agreed (by a vote of 4 to 3, in a case involving a large regional shopping center) that there is a constitutional right, under Article IV, section 1, to enter at least some kinds of private property for the purpose of initiative petitioning. *Lloyd Corporation v. Whiffen*, 315 Ore. 500, 849 P.2d 446 (1993). One of the permanent members of the court recused herself from that case, and the fourth and deciding vote was cast by a retired justice sitting *pro tem*.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Holding that Initiative Petitioners Are Not State Actors Is Contrary to This Court's Precedents and Conflicts with a Ruling of the Court of Appeals for the District of Columbia Circuit. It Effectively Prevents Fred Meyer from Obtaining a Federal Court Adjudication of its Federal Constitutional Rights.

Three lines of precedent in this Court's cases point to the conclusion that initiative petitioners, when they invade private property in order to gather signatures on their petitions, are state actors.

A. Delegation of State Power to Private Individuals

When a state confers on private parties a power that has traditionally been the exclusive prerogative of the government, the private parties are state actors when they exercise that power. That principle is as old as *United States v. Classic*, 313 U.S. 299, 326 (1941): "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."

The Court amplified and applied that principle in *Smith v. Allwright*, 321 U.S. 649 (1944), where it held that the Fifteenth Amendment forbids the exclusion of black voters from primary elections conducted by a private entity (the Democratic Party of Texas). The Court in *Allwright* said that

Classic "makes clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the state." *Id.* at 660.

The Court came to a similar conclusion three years later with respect to the "pre-primary" elections of the Jaybird Democratic Association, an organization of white voters in Texas whose candidates nearly always ran unopposed in the subsequent primary and general elections. *Terry v. Adams*, 345 U.S. 461 (1953). The Court held that these pre-primary elections were subject to the restrictions of the Fifteenth Amendment even though there was a "complete absence" of formal state connection to any of the activities of the Association. *Id.* at 489 (Minton, J., dissenting).

Commenting on *Terry* and *Smith* in *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978), the Court stated that "[w]hile many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the state.' [¶] One such area has been elections." But as *Terry* and *Smith* demonstrate, even though elections are "exclusively" the function of the state, it is possible for states to permit private entities to conduct them. When that happens, and private individuals are permitted to conduct the "exclusive" state function of elections, those private individuals become state actors, for "the conduct of the elections themselves [remains] an exclusively public function." *Flagg Bros.*, 436 U.S. at 158.

The same principle applies here. Laws are not made by private individuals; they are made by the sovereign. In our

system of government, the state is sovereign. When private individuals engage in "public lawmaking"[2] by circulating petitions to put a proposed law on the ballot, they are engaged in an "exclusively public function," *Flagg Bros.*, 436 U.S. at 158, just as much as the members of the legislature are when they draft and debate proposed laws.

Furthermore, in *Smith v. Allwright* the Court stated that extensive statutory control of primary elections in Texas "makes the party which is required to follow these legislative directions an agency of the state in so far as it determines the participants in a primary election." 321 U.S. at 663. A similar conclusion is appropriate here, for the entire process of initiative petitioning in Oregon is subject to detailed state regulation. The form and content of the petition and the method of gathering signatures must conform to strict statutory and regulatory requirements. Ore. Rev. Stat. chapter 250; Ore. Admin. Rules 165-14-005 to 165-14-090. Before petitions are circulated, two of Oregon's six state-wide elected executive officials must participate in their preparation, and often the State Supreme Court does so as well. The Secretary of State must determine whether the measure satisfies the "one subject" rule of the Oregon Constitution. *OEA v. Roberts*, 301 Ore. 228, 721 P.2d 837 (1986). The Attorney General must prepare a ballot title for the proposed measure, which must comply with detailed statutory requirements. Ore. Rev. Stat. §§ 250.035, 250.065. Electors who are dissatisfied with the

---

[2] The Oregon Supreme Court so described the initiative petitioning process in *Lloyd Corporation v. Whiffen*, 307 Ore. 674, 684, 773 P.2d 1293 (1989).

Attorney General's ballot title may, and frequently do, petition the Supreme Court to change it. Ore. Rev. Stat. § 250.085.

The initiative petitioning process in Oregon is thus subject to extensive statutory control, and as with the primary election process at issue in *Smith v. Allwright*, that control makes the individuals who are subject to it agents of the state in so far as they determine which proposed laws will be presented to the voters for their approval.

B. State Authorization for Private Individuals to Invade Private Property.

In this case, the State of Oregon has not merely delegated the public function of lawmaking to private individuals; it has also authorized them to enter private property when they carry out that function. When private individuals take advantage of that authorization, and invade private property, they act "under color of" state law. That principle is illustrated by *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In that case, a New York statute required landlords to permit cable television companies to install their cables and related equipment on the landlord's property. The state did not compel the private cable companies to make that invasion; it simply authorized the invasion, and compelled the property owner to accept it. This Court concluded that the Takings Clause of the Fifth Amendment applied to that invasion of private property by a private company, and the private company was clearly acting "under color of" state law when it carried out that invasion.

The state action aspect of *Loretto* was recently described by the Court of Appeals for the District of Columbia Circuit as follows:

> "State action existed in both of those cases [that is, *Loretto* and *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982)] because the government conferred on private parties power that 'traditionally had been the exclusive prerogative' of the government (*San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 544 (1987)), in *Larkin* the power to veto liquor licenses, in *Loretto* the power to enter an occupied private property without the owner's consent." *Alliance for Community Media v. F.C.C.*, 56 F.3d 105, 113 (D.C. Cir. 1995), *cert granted*, 116 S.Ct. 471 (1995).

That is exactly what has happened in this case: state law (here, the state constitution) has conferred on private parties the power to enter Fred Meyer's private property in order to carry out their law-making activity, and at the same time it has compelled Fred Meyer to provide a forum on its property for that law-making activity. Under *Smith*, *Terry*, and *Loretto*, the respondents in this case were acting "under color of" state law when they invaded Fred Meyer's property for that purpose.

C. Application of State Rules of Law to Restrict Constitutional Rights

If Fred Meyer were to use self-help to protect its property rights, by placing initiative petitioners under arrest for trespass or forcibly removing them from its property, the petitioners would be able to use Oregon's judicial system to stop Fred Meyer from doing so. They could sue Fred Meyer for false arrest (one such case recently resulted in a jury award of damages against the company, after the trial judge instructed the jury, in reliance on *State v. Cargill*, that Fred Meyer's directive to a petitioner to leave its property was not "lawful" and that therefore her subsequent arrest for trespass was "false"), or they could sue the company for declaratory and injunctive relief, requiring it to allow them on its property. They would thus be using the judicial power of the state in a manner that would violate Fred Meyer's Fifth Amendment right not to have its property taken without just compensation. When legal obligations are enforced through the "official power of [state] courts[,] *** that is enough to constitute 'state action' for purposes of the Fourteenth Amendment." *Cohen v. Cowles Media Co.*, 501 U. S. 663, 668 (1991).

D. The Error in the Ninth Circuit's Reasoning

The Ninth Circuit erred in concluding that respondents were not acting under color of state law when they invaded Fred Meyer's property. That court reasoned that Fred Meyer might still be able to obtain injunctive relief against some petitioners in some circumstances, and that therefore the respondents in this case who entered Fred Meyer's property in

order to gather signatures were not acting under color of state law. That conclusion is a *non sequitur*. As Judge Reinhardt correctly pointed out in his concurring opinion (A-12), the question of whether Fred Meyer can obtain injunctive relief or ask the state to prosecute petitioners for criminal trespass is irrelevant to the issue of whether the defendants are state actors. The evidence in this case was uncontradicted that these respondents *did* enter Fred Meyer's premises and solicited its customers to sign their initiative petitions, causing significant disruption to Fred Meyer's business while they did so; and the *only* reason they were able to do so was that they were "clothed with the authority of state law," *United States v. Classic*, 313 U.S. at 326 -- in this case, the Oregon Constitution. The issue here is not, as the majority of the Ninth Circuit panel seemed to conceive it, what may happen with respect to other petitioners on other occasions; the issue is whether *in this case, these petitioners* were acting under color of state law when they invaded Fred Meyer's property. Plainly they were.

The Ninth Circuit's erroneous view of this Court's "state action" precedents conflicts with the correct view of those precedents set out in the District of Columbia Circuit's opinion in *Alliance for Community Media v. F.C.C.* The Court should grant certiorari to resolve the conflict.

II. No State, Other Than Oregon, Has Required the Owner of a Single, Free-Standing Store to Provide a Forum for Initiative Petitioners. In Imposing that Requirement, the Oregon Courts Have Misread This Court's *PruneYard* Opinion and Violated Fred Meyer's Rights Under the Free Speech Clause of the First Amendment and the Takings Clause of the Fifth Amendment.

In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Court rejected Free Speech and Takings Clause challenges to a ruling by the California Supreme Court that the California Constitution protects speech and petitioning in privately owned shopping centers. In the 16 years since *PruneYard* was decided, the courts of the various states have divided sharply on the question of whether their state constitutions confer a right on private individuals to enter the private premises of large regional shopping centers in order to solicit signatures on petitions.

However, *no* reported appellate court decision in the nation has extended the *PruneYard* principle to a single freestanding store, *except* for the decisions of the Oregon courts with respect to Fred Meyer stores. In California itself, for example, where a state constitutional right to use shopping center premises for expressive purposes was first recognized, the courts have limited that ruling to large regional shopping centers and have held that individual retail stores, similar to Fred Meyer stores, are *not* public forums, even when they are located in a small strip mall. *Judlo, Inc. v. Vons Companies, Inc.*, 211 Cal. App.3d 1020, 259 Cal. Rptr. 624 (1989).

By requiring Fred Meyer to provide a forum for initiative petitioning on the premises of its single, freestanding stores, the Oregon courts have misapplied this Court's decision in *PruneYard*, and in doing so have violated Fred Meyer's rights under the Free Speech Clause of the First Amendment and the Takings Clause of the Fifth Amendment.

A. When the State of Oregon Requires Fred Meyer to Provide a Forum for Initiative Petitioners, It Violates Fred Meyer's Rights Under the First Amendment.

In *Pacific Gas & Elec. v. P.U.C. of California*, 475 U.S. 1, 11 (1986), the Court reiterated the principle that the First Amendment protects both a right to speak and "a concomitant freedom *not* to speak publicly." (Emphasis in original; internal quotation marks and citation omitted.) Under the First Amendment, "the State is not free *** to force [someone] to respond to views that others may hold," *id.* at 11, and "[f]or corporations as for individuals, the choice to speak includes within it the choice of what not to say." *Id.* at 16. Under those principles, the Court held that California could not require a utility to carry in its own billing envelopes messages from a citizens group with which it disagreed.

In *PruneYard*, the Court held that California did not violate a shopping center owner's right "not to speak" when the state required the owner to permit a group of high school students to set up a card table in one corner of a central courtyard known as the "Grand Plaza" to distribute pamphlets and solicit support for a petition opposing a United Nations resolution. In that case, however, there was no evidence that

patrons of the shopping center objected to the students' presence, 447 U.S. at 77; there was no likelihood that the students' message would be associated with the shopping center, *id.* at 87; and (as the Court later noted) "the owner did not even allege that he objected to the content of the pamphlets." *Pacific Gas & Elec.*, 475 U.S. at 12. Moreover, Justice Powell's concurring opinion emphasized that the Court's decision was tied to the particular facts of the case before it, *PruneYard*, 447 U.S. at 96, and that if the record established that the third party's views were likely to be associated with those of the shopping center, then the shopping center would be forced to speak in violation of its right not to speak. *Id.* at 101. "On the record before us," he said, "I cannot say that the customers of this vast center would be likely to assume that the appellees' limited speech activity expressed the views of PruneYard or of its owner." *Id.*

The record in this case reveals a very different set of facts. Where a shopping center is a diffuse entity with scores of stores and shops owned and operated by many different persons and entities, there may be little risk that customers will identify the views of third parties who use the center's common areas with the views of the center's owner. Fred Meyer stores, however, are not diffuse entities, and the evidence in the record here showed that when initiative petitioners solicit signatures right outside the main entrance to its stores, the Fred Meyer name becomes associated with their particular causes--causes that are controversial and divisive. Many customers assume that Fred Meyer supports the petitioners' cause whenever *any* petitioners appear at its stores, and in this particular case, the Company received hundreds of

customer complaints, and threats to boycott its stores, as long as the respondents were present at the stores.

Fred Meyer does not wish to be identified in any way with the controversies surrounding those causes, but if it is required to provide a forum for the expressions of views on these issues, it would be required to speak when it would prefer not to speak, simply in order to disassociate itself from those views. By requiring Fred Meyer to provide a forum for initiative petitioners, therefore, the State of Oregon has violated its First Amendment right not to speak, not to be associated with particular political points of view, and not to subsidize or appear to endorse the political speech of other persons.

B. This Court's Recent Takings Clause Decisions Demonstrate that By Requiring the Owners of Single Freestanding Stores to Provide a Forum for Initiative Petitioning, the State of Oregon is Taking the Owners' Property without Just Compensation in Violation of the Fifth Amendment.

"[A] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 426. The Oregon Constitution, as construed by Oregon's appellate courts, requires Fred Meyer to provide a permanent, year-round forum for initiative petitioning activity. That fact, together with the physical characteristics of Fred Meyer stores (which make the presence of initiative petitioners far more intrusive than they are at a

large regional shopping center), distinguishes this case from *PruneYard*, where the Court held that a taking had *not* occurred, and shows why a taking *has* occurred in this case.

First, the intrusion in *PruneYard* was brief and insignificant: it consisted of a single act of soliciting signatures by a group of high school students who set up a card table in a corner of the central courtyard of the shopping center to gather signatures on a petition directed to the United Nations. There was no evidence in the record that the students, or any other group, wanted to return to PruneYard to solicit signatures. 447 U.S. at 83-84 (majority opinion); *id.*at 96 (Powell, J., concurring). In contrast, the evidence here is that initiative petitioners seek access to Fred Meyer's property on a year-round basis. Requiring Fred Meyer to permit such repeated physical invasions of its property constitutes precisely the type of extended, continuous physical invasion that the Court found to constitute a taking in *Loretto*.

Second, Fred Meyer stores are not like the PruneYard Shopping Center. The PruneYard Center covered 21 acres occupied by walkways, plazas, sidewalks, and buildings containing more than 65 separate retail shops, 10 restaurants, and a movie theater. In contrast, Fred Meyer stores have no central plaza or any other common areas that resemble public sidewalks in a business district. Rather, Fred Meyer stores are single free-standing buildings with two or three principal entrances leading to an adjacent parking lot. Shoppers who patronize the stores in a large regional shopping center may not even be aware of the presence of petitioners in the typically vast common areas of such centers, but everyone who patronizes a Fred Meyer store must pass immediately by, or

take evasive action to avoid, the petitioners stationed at Fred Meyer's doors.

Third, the presence of initiative petitioners at the entrances to Fred Meyer stores has caused a substantial number of customer complaints. This increased interference with the owner's use of its property demonstrates that a taking has occurred, a conclusion supported by Justice Powell's concurrence in *PruneYard*:

> "*** I join Parts I-IV [of the Court's Opinion] on the understanding that our decision is limited to the type of shopping center involved in this case. Significantly different questions would be presented if a State authorized strangers to picket or distribute leaflets in privately owned, freestanding stores and commercial premises. Nor does our decision today apply to all 'shopping centers.' This generic term may include retail establishments that vary widely in size, location, and other relevant characteristics. Even large establishments may be able to show that the number or type of persons wishing to speak on their premises would create a substantial annoyance to customers that could be eliminated only by elaborate, expensive, and possibly unenforceable time, place, and manner restrictions. As the Court observes, state power to regulate private property is limited to the adoption of reasonable restrictions that

> 'do not amount to a taking without just compensation or contravene any other federal constitutional provision.'" 447 US at 96-97.

The limitation on the *PruneYard* holding suggested by Justice Powell's concurrence has been fully borne out in the Court's more recent decisions under the Takings Clause. First, in *Loretto v. Teleprompter Manhattan CATV Corp., supra*, the Court held that a taking had occurred when New York authorized Teleprompter to string 36 feet of 1/2 inch coaxial cable and to place two switch boxes, all amounting to about 1 1/2 cubic feet of material, on a private building. The Court drew a distinction between governmental regulation and governmental activities which amount to a physical occupation of property (either directly or by authorizing others to do so). The distinction lies in the fact that "a physical invasion [of property] is a government intrusion of an unusually serious character." 458 U.S. at 433 (footnote omitted). The Court also made it clear that physical occupation authorized by state law is a taking regardless of whether the state, or a party authorized by the state, is the occupant. 458 U.S. at 433 n.9.

Second, in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Court overturned a permit condition of the California Coastal Commission which required a property owner to grant a public easement over a portion of the owner's property as a condition for securing a building permit. Prior to reaching the regulatory taking analysis, however, the Court stated that if the state had affirmatively required the property owner to grant an easement (as opposed to conditioning a permit approval upon grant of an easement), such action would clearly have constituted a physical taking:

> "Had California simply required the Nollans to make an easement across their beach front available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking." 483 U.S. at 831.

The court noted that for purposes of determining whether a physical taking has occurred, the appropriate analysis is whether the State has authorized a permanent right to pass through real property. It is not necessary to a physical taking that a particular individual or individuals be permanently located upon the property.

> "We think a 'permanent physical occupation' has occurred, for purposes of that rule [*Loretto*], where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." 483 U.S. at 832.

Nollan distinguished *PruneYard* on the ground that "there the owner had already opened his property to the general public, and in addition permanent access was not required." 483 U.S. at 832 n.1. This case is distinguishable from *PruneYard* for similar reasons: the evidence here showed (a) that Fred Meyer has opened its property to the general

public *only* for the business purpose of shopping at its stores, and not for browsing, congregating, assembling, window-shopping, being educated or entertained, or for any of the other activities that may take place at a large regional shopping center, and (b) that initiative petitioners seek access to Fred Meyer's premises on a year-round basis--in effect, a permanent easement for political activity.

If the Oregon Legislature were to commandeer Fred Meyer's property to use as a meeting place to carry out *its* legislative function, no one would doubt that a taking had occurred. When respondents commandeered Fred Meyer's property for the purpose of carrying out their legislative function, there is likewise no doubt that a "taking" has occurred.

Less than two years ago, in a case also arising from Oregon in which the Court rejected the Oregon Supreme Court's erroneously narrow view of the Takings Clause, the Court observed that that clause is "as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment," and it reiterated that the "right to exclude others is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2320 (1994) (citation omitted). The Court should grant certiorari in this case in order to make it plain that a state may not compel the owner of a single freestanding retail store to provide a forum on its property for the political activity of initiative petitioners.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Charles F. Hinkle*
STOEL RIVES LLP
900 SW Fifth Avenue, Ste. 2300
Portland, OR 97204-1268
Telephone: (503) 224-3380
*Counsel of Record for Petitioner

February 15, 1996

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRED MEYER, INC., a Delaware corporation,	)	Court of Appeals No. 92-35067
Plaintiff-Appellant;	)	
v.	)	District Court No. 91-1320-FR
WILLIAM CASEY; HERB L. GRAY; KEN BENJAMIN; MIKE WILEY; LON MABON; PHILLIP Z. RAMSDELL, NO SPECIAL RIGHTS COMMITTEE; OREGON CITIZENS ALLIANCE; JOHN DOES 1 Through 50; JANE DOES, 1 Through 50,	)	OPINION
Defendants-Appellees.	)	

Appeal from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge, Presiding

Argued and Submitted
November 5, 1993 -- Portland, Oregon

Decided October 10, 1995

Before: Reinhardt, Brunetti, and Fernandez,
Circuit Judges.

Opinion by Judge Brunetti;
Concurrent by Judge Reinhardt.

COUNSEL

Bruce R. McCain, Portland, Oregon, for defendants-appellees.

Charles F. Hinkle, Stoel Rives Boley Jones & Grey, Portland, Oregon, for the plaintiff-appellant.

OPINION

BRUNETTI, Circuit Judge:

I. INTRODUCTION

Appellant Fred Meyer, Inc. ("Fred Meyer") brought a 42 U.S.C. § 1983 claim against appellee defendants. Fred Meyer is a Delaware corporation which operates approximately forty freestanding, large retail stores in Oregon. The defendants are organizers and proponents of two initiative petitions. The district court dismissed the action for failure to state a claim, because it found that Fred Meyer failed to show that defendants were acting under color of state law. This Appeal followed. We review the district court's dismissal de novo. *See Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1507 (9th Cir. 1990); *Bergquist v. County of Cochise*, 806 F.2d 1364, 1367 (9th Cir. 1986). We affirm.

II. FACTUAL BACKGROUND

Beginning on December 14, 1991, certain of defendants entered onto properties of Fred Meyer without its permission to solicit signatures of registered voters to qualify two initiatives for election. The first initiative for which the defendants sought signatures would have amended the charter of the City of Portland to restrict the ability of the City of Portland to pass or enforce laws related to the sexual orientation of any person. The second initiative for which defendants sought signatures would have amended the Oregon Constitution in a similar fashion. Several defendants stood outside the main entrances of various Fred Meyer stores asking shoppers to sign the petitions. When these defendants started soliciting signatures, customers of Fred Meyer began complaining and threatening to boycott Fred Meyer stores and to return prior purchases for refunds. Many customers believed that Fred Meyer was sanctioning the petitions by "allowing" the defendants to remain on its properties. Fred Meyer, however, opposed the presence of the defendants on its properties and has maintained a consistent policy of forbidding all persons, regardless of their cause, from soliciting signatures for initiative petitions on Fred Meyer properties.

In the past, when persons entered the properties of Fred Meyer to solicit signatures for initiative petitions, it would ask them to leave. Fred Meyer's consistent policy has been to seek civil injunctions against petitioners who refuse to leave its premises and to lobby against bills introduced in Oregon legislative sessions which create a statutory privilege to petition on private property. In addition, Fred Meyer has

called the police and had petitioners arrested for criminal trespass.

III. DISCUSSION

A. 42 U.S.C. § 1983

[1] Fred Meyer brought this action under § 1983 which provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988). Under this section, Fred Meyer must allege and prove that (1) defendants acted or are acting under color of the laws of Oregon; (2) defendants deprived Fred Meyer of a right secured by the Constitution or laws of the United States. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155, 98 S. Ct. 1729, 1732-33, 56 L.Ed.2d 185 (1978).

Fred Meyer contends that defendants were and are acting under color of the laws of Oregon, since the defendants claim the right to enter the properties of Fred Meyer by virtue of the decision of the Oregon Court of Appeals in *State v.*

Cargill, 100 Or.App. 336, 786 P.2d 208 (1990), *aff'd by an equally divided court*, 316 Or. 492, 851 P.2d 1141 (1993).

Fred Meyer argues that it has met the second of the § 1983 requirements because defendants have violated several of its Constitutional rights. First, Fred Meyer claims that it has a § 1983 claim against defendants because it has a right under the First Amendment to the United States Constitution not to be associated with the speech and ideas of defendants. Second, Fred Meyer alleges that defendants' actions amount to a "taking"of its property without just compensation as prohibited by the Fifth and Fourteenth Amendments to the United States Constitution.

Because we find that Fred Meyer failed to satisfy the first requirement that defendants are acting under color of state law, we affirm the district court's dismissal of this action. Like the district court, we need not decide whether the second requirement has been satisfied, although we note that the Supreme Court's decision in *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 100 S. Ct. 2035, 64 L.Ed.2d 741 (1980), would appear to preclude Fred Meyer's claim.

B. STATE v. CARGILL

In *Cargill*, the defendants solicited signatures on sidewalks outside the entrances of a Fred Meyer store in Portland. After refusing to obey the directive of Fred Meyer to leave its property, the defendants were arrested and subsequently convicted of criminal trespass in the second degree.

The Oregon Court of Appeals reversed defendants' convictions, holding that Article IV, section 1 of the Oregon Constitution[3] "prohibits using a criminal prosecution to prevent the people from collecting signatures on initiative and referendum petitions in areas that have replaced traditional forums for the collection of signatures, so long as there is no substantial interference with the owner's use of the property for business or other purposes." *Id.* 786 P.2d at 215. The court stated that "[p]rosecuting defendants for criminal trespass for refusing to obey a direction [of Fred Meyer] to leave the entrance of the store under these circumstances would render inadequate the people's opportunity to function in their legislative role and would violate Article IV, section 1." *Id.* At 214-15. The court found that "[t]he Fred Meyer store at which defendants were arrested is a modern replacement for the town square or park. It is open to the public, and citizens are invited to come and congregate on the premises." *Id.* At 212. Significantly, the court concluded that Fred Meyer itself had opened its property to the public.

Fred Meyer's invitation to the public was broad and for more than just commercial activity. Its premises, by reason of the owner's invitation, became a forum for assembly by the community. Notwithstanding the company's apparent policy against allowing petitioners on its property, there is no evidence that defendants' activities substantially interfered with Fred Meyer's commercial activity, had a serious economic

---

[3] This section of the Oregon Constitution authorizes initiative and referendum. *See* Or. Const. art. IV, § 1.

impact on the company or interfered with its "reasonable investment backed expectations."

C. STATE ACTION

[2] Fred Meyer's § 1983 claim requires a showing that defendants are acting under "color of state law." The Supreme Court has stated that "conduct satisfying the state-action requirement of the Fourteenth Amendment satisfies the statutory requirement of action under color of state law." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 n. 18, 102 S. Ct. 2744, 2752 n. 18, 73 L.Ed.2d 482 (1982). In *Lugar*, the Court established a two-part state action test to determine if conduct that allegedly caused the deprivation of a federal right could be fairly attributable to the State. The two requirements are that:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible.... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

Id. At 937, 102 S. Ct. At 2754.

In this case, the first prong of the state action test is met, since the Oregon Constitution authorizes defendants' obtaining signatures for the initiative and referendum process. However, the defendants are not state actors, and thus the second prong is not met.

Describing this second prong, the Supreme Court has stated that an individual may be a state actor "because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Id.* Applying this test, the Court examined the following: "the extent to which the actor relies on governmental assistance and benefits; whether the actor is performing a traditional governmental function; and whether the injury caused is aggravated in a unique way by the incidents of governmental authority." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621-22, 111 S. Ct. 2077, 2083, 114 L.Ed.2d 660 (1991) (citations omitted).

[3] In this case, the defendants are private citizens and entities, not state officials or employees. However, Fred Meyer argues that defendants are state actors because the State of Oregon, acting through its court system by virtue of *Cargill*, provides the defendants' sole authorization for their use of its property. Fred Meyer believes that defendants have the right to collect signatures in front of its stores only because of this "significant aid" from state officials, and it contends that the State thus requires it to provide a forum for defendants' activity.

We disagree. *Cargill* does not merit a finding that the defendants in this case were state actors. The Oregon courts have limited the application of *Cargill*. *See State v. Dameron*, 316 Or. 448, 853 P.2d 1285, 1289 n. 7 (1993) ("Although *Cargill* could be read expansively to apply to every Fred Meyer store in Oregon and, by inference, to every comparable retail store, the Court of Appeals since has made it clear that

an expansive reading of *Cargill* was not intended."); *see also Fred Meyer, Inc. v. McDonald*, 112 Or.App. 321, 828 P.2d 1054 (1992), *rev. den.*, 316 Or. 382, 852 P.2d 839 (1993). Moreover, Fred Meyer, which has opened its properties to the public, still has the options to restrict petitioning in front of its stores.

Cargill leaves room for the case in which Fred Meyer could ask the State to prosecute individuals for criminal trespass if it could show substantial business interference with its property. *Cargill*, 786 P.2d at 215. Thus, Fred Meyer cannot assume that the State would not prosecute solicitors for criminal trespass if they substantially interfered with business.

Fred Meyer also argues that after *Cargill* and the subsequent case of *Fred Meyer, Inc. v. McDonald*, it cannot even obtain a civil injunction to prevent solicitation of signatures in front of its stores. In *McDonald*, the trial court held that based on *Cargill*, it could not issue Fred Meyer a civil injunction. *See Fred Meyer, Inc. v. McDonald*, No. 9003-01409 (Multnomah County Cir.Ct. May 4, 1990). However, the Oregon Court of Appeals reversed the trial court's decision in *McDonald*, holding that "Cargill is limited by its facts. It involved a single store at which the defendants were arrested for criminal trespass. The trial court was not bound to come to the same conclusion just because the signature gatherers were located at [Fred Meyer] stores." *McDonald*, 828 P.2d at 1055. Thus, Fred Meyer is incorrect to assume that *Cargill* precludes it from obtaining a civil injunction. In fact, Fred Meyer obtained a preliminary injunction from a state court against the defendants in this case because it showed that defendants' petitioning caused a

substantial interference with business. *See Fred Meyer v. Casey*, No. 9112-08270, (Multnomah County Cir.Ct. Order of Preliminary Injunction January 13, 1992). The state court's issuance of the injunction shows that the courts will treat Fred Meyer stores and the specific facts of each case individually.

Other courts have also supported the issuance of civil injunctions restricting solicitation of ballot signatures, further suggesting that *Cargill* is limited to its facts. In *Lloyd Corp., Ltd. v. Whiffen (Whiffen II)*, 315 Or. 500, 849 P.2d 446, 454-55 (1993) (internal quotations omitted), the Oregon Supreme Court accepted the principle that although the plaintiff could not obtain "an injunction to prohibit peaceful solicitation of signatures in the mall or on its walkways that does not substantially interfere with the commercial activity of the premises ... defendants' right to gather signatures in the common areas of [plaintiff's center] are subject to reasonable time, place, and manner restrictions." This principle allows courts to

> issue an injunction imposing reasonable restrictions on any attempted possession (e.g., setting up card tables) by defendants of any part of plaintiff's premises and may also place reasonable restrictions on the time, place, and manner of seeking petition signatures in plaintiff's mall or on its walkways so as to reduce or eliminate interference and distraction, short of confining signature solicitors to the least traveled byways and to times when few people are at the [mall]. The

> number of petition signature-gatherers may also be limited.

Lloyd Corp., Ltd. v. Whiffen (Whiffen I), 307 Or. 674, 773 P.2d 1294, 1301 (1989). Thus, Fred Meyer is incorrect to state that it does not have any recourse to limit the actions of solicitors of ballot signatures.

On the basis of our holding, Fred Meyer's argument that the defendants, who are private actors, became state actors because they solicited signatures only with the help of state authority is without merit, and its attempt to parallel its action to such cases is unpersuasive. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S. Ct. 2077, 114 L.Ed.2d 660 (1991); *U.S. v. DeGross*, 960 F.2d 1433, 1440 (9th Cir. 1992). In addition, Fred Meyer's claim that defendants are state actors because they engaged in a traditional state function fails, since legislation in Oregon is not the exclusive prerogative of the state. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 842, 102 S. Ct. 2764, 2771-72, 73 L.Ed.2d 418 (1982).

IV. CONCLUSION

The district court properly dismissed Fred Meyer's action. The defendants in this case are not state actors by virtue of the Oregon Court of Appeals' decision in *Cargill*, since *Cargill* is limited to its facts, allows Fred Meyer to limit solicitation of ballot signatures in front of his stores, and specifically states that Fred Meyer itself opened its properties by extending a broad invitation to the public. Oregon is not providing significant aid to the defendants; it is Fred Meyer and not the State of Oregon that created a public forum where defendants

in this case solicited signatures. Fred Meyer has not alleged the requisite state action and thus has not stated a cognizable § 1983 claim.

AFFIRMED.

REINHARDT, Circuit Judge, concurring:

The question in this case is whether private individuals gathering signatures on Fred Meyer's property are state actors. I agree with the majority that they are not and, therefore, that the district court properly dismissed Fred Meyer's section 1983 claim. I do not, however, agree with the majority's confusing and misleading explanation of *why* the defendants are not state actors. My colleagues make the problem far more complicated than it is, rely on the wrong law, and leave the erroneous impression that our answer might be different but for the niceties of Oregon appellate court decisions.

My colleagues reach their conclusion for two overlapping and equally irrelevant reasons: first, that the right of access to certain property articulated in *State v. Cargill*, 100 Or.App. 336, 786 P.2d 208 (1990), *aff'd by an equally divided court*, 316 Or. 492, 851 P.2d 1141 (1993), has been limited by later Oregon state court cases; second, that Fred Meyer may impose reasonable time, place and manner restrictions on the activities of signature-gatherers. Rather than resting on these wholly irrelevant grounds, the first of which has the additional vice of being based on an erroneous reading of Oregon court decisions, I prefer to rely on elementary principles of law regarding the distributions of powers between the people and

their government, as well as non-controversial and controlling United States Supreme Court precedent.

The whole purpose of the initiative process is to permit the people to act when their government fails to do so. In the absence of some unprecedented and peculiar state law that would transform that process into its polar opposite, citizens gathering signatures to place a measure on a ballot simply are not state actors.

I.

I should note preliminarily that the only defendants here are the signature-gatherers and that there is no contention that in collecting signatures they were acting in conjunction with any state officials. The United States Supreme Court's decisions clearly delineate the limited situations under which a private individual may be considered a state actor. This case is indisputably not among them.

In *Edmonson v. Leesville Concrete Co.*, the Court stated: "Although the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its participants may be deemed to act with the authority of the government and, as a result, be subject to constitutional restraints." 500 U.S. 614, 619, 111 S. Ct. 2077, 2082, 114 L.Ed.2d 660 (1991). In determining whether a defendant is a state actor, courts should examine: "[1] the extent to which the actor relies on governmental assistance and benefits, [2] whether the actor is performing a traditional governmental function, and [3] whether the injury caused is aggravated in a

unique way by the incidents of governmental authority." *Id.* at 662, 111 S. Ct. at 2083. Fred Meyer has no colorable argument to offer regarding the third factor, and its arguments on the first two factors fail completely in light of *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 98 S. Ct. 1729, 56 L.Ed.2d 185 (1978).[4]

A.

The first relevant question, for purposes of determining whether the defendants are state actors, is the extent to which they rely on "governmental assistance and benefits." *Edmonson*, 500 U.S. at 621, 111 S. Ct. At 2083. It is with respect to this question that the majority launches into its search and destroy mission through Oregon state law. That expedition is, of course, wholly unnecessary. The state has provided no governmental assistance or benefits to the defendants.

The closest analogy is found in *Flagg Bros.* The state statute at issue in that case permitted the defendant storage company to dispose of the plaintiff's property. The plaintiffs argued that the defendant could be deemed state actors because, by enacting the statute, the state had "authorized and encouraged" the defendants' conduct. 436 U.S. at 164, 98 S. Ct. At 1737-38. The Court rejected the argument. It said that the state had simply "announce[d] the circumstances in

---

[4] The third factor enumerated in *Edmonson*--that the injury be aggravated in a unique way by the incidents of governmental authority--is clearly inapplicable here, since no incidents of governmental authority are involved.

which its courts will not interfere" with deprivations of property. *Id.* At 166, 98 S. Ct. at 1738-39. The state's declaration that it would not act was, in the Court's view, insufficient to transform the private defendants into state actors. *Id.* at 164-65, 98 S. Ct. at 1737-38.

As in *Flagg Bros.*, "the crux of [Fred Meyer's] complaint is not that the State *has* acted, but that it has *refused* to act." *Flagg Bros.*, 436 U.S. at 166, 98 S. Ct. at 1738. By refusing to prosecute the defendants as trespassers, and by limiting the circumstances in which Fred Meyer can obtain an injunction against their activities, the state has simply "decline[d] to provide a remedy for [a] private deprivation[ ] of property." *Id.*[5] That does not constitute state assistance and, thus, does not transform the defendants into state actors--regardless of the scope of the petition gatherers' rights of access.

In fact, the Oregon court decisions granting signature-gatherers a right of access to property do not make the defendants state actors, wholly aside from any active/passive distinction set forth in *Flagg Bros.* A judicial declaration that citizens have the right to enter certain privately owned property in order to gather signatures for initiative petitions

---

[5] Although the state rule authorizing defendants' conduct in the present case is decisional rather than statutory, the incidental analysis applies. *See Flagg Bros.*, 436 U.S. at 161 n. 10, 98 S. Ct. At 1735 n. 10 (concluding that "the mere existence of a body of property law in a State, whether decisional or statutory," was insufficient to support a finding that defendants were state actors).

does not constitute the providing of "governmental assistance of benefits" to those citizens. Instead, it simply constitutes a recognition that certain rights are protected by the Oregon Constitution. A declaration of constitutional rights does not convert private individuals to whom those rights inure into state actors.

B.

The next question is whether the defendants are exercising a traditional governmental function. While I agree with the conclusion the majority expresses in its one-sentence resolution of this issue, I think it worthwhile to offer a reasoned explanation of *why* they are not.

Cases falling within the traditional governmental function rationale have been narrowly and carefully defined. *Flagg Bros.*, 436 U.S. at 156--60, 98 S.Ct. At 1734-35. In dismissing the plaintiffs' argument that the defendants were state actors, the *Flagg Bros.* Court explained that "very few" state functions are traditionally exclusively reserved to the state, with the primary examples being the function of conducting elections of state officials and the municipal function.[6] *Id.* At 157-58, 98 S.Ct. At 1733-35 (citing, *inter*

---

[6] The court also left open the possibility that such functions as education, fire and police protection, and tax collection would be found to have been administered with a sufficient degree of exclusivity to be covered by the traditional governmental function doctrine. *Id.* at 163 & n. 14, 98 S.Ct. At 1737 & n. 14. Tax collection appears

(continued...)

alia, *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953) ("white primary" case), and *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946) ("company town" case));[7] *see also Edmonson*, 500 U.S. at 625-26, 111 S.Ct. at 2086 (peremptory challenges in jury selection). According to *Flagg Bros.*, the exclusive governmental function doctrine does not reach *private* political activity, but only the conduct of elections. *Flagg Bros.*, 436 U.S. at 158, 98 S.Ct. At 1735.

This case involves private political activity. The initiative power exercised by the defendants is not an exclusive state function or a state function at all. To the contrary, that power is "reserved to the people" by the Oregon Constitution. *See Lloyd Corp. v. Whiffen*, 315 Or. 500, 849 P.2d 446, 451-52 (1993) (quoting Or. Const., Art. IV, Sect. 1, which states that "the initiative and referendum powers," part of the legislative power, are "reserved to the people"). So too with

---

(...continued)
clearly to qualify. Some of the others may be more problematic. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982) (private school funded primarily by public sources and regulated by public authorities not state actor).

[7] In light of *Marsh* and its progeny, there is considerable irony in Fred Meyer's claim that the defendants are state actors. The locus of dispute in this line of cases has always been whether the *property-owner* can properly be deemed a state actor. *See, e.g.*, *Whiffen II*, 849 P.2d at 474 (Gillette, J., dissenting).

the initiative process in the other states. *See* Cal. Const. Art. II, § 8.

Fred Meyer plainly confuses the powers of the state with those of the people. The people act for themselves when they exercise their reserved powers, not on behalf of the state. The state acts by *conducting* elections, *collecting* taxes, and performing other governmental functions. *See Ball v. James*, 451 U.S. 355, 366, 101 S.Ct. 1811, 1818-19, 68 L.Ed.2d 150 (1981); *Flagg Bros.*, 436 U.S. at 163, 98 S.Ct. at 1737. The functions performed by the people are entirely different. When a person *votes* in a state-conducted election, he is exercising a reserved power; he is not a state actor. When a person *pays* taxes to a state tax collector, he is acting as a private citizen. It is the polling official, the vote counter, and the tax collector who are the state actors. Similarly, when a person petitions the government to redress his grievances, he is indisputably not acting on behalf of the state or under color of law. So too, when a person seeks to have a measure placed on the ballot, either by collecting signatures or otherwise, he is exercising the privileges of a citizen, not acting on behalf of the state. Thus, both a proper reading of *Flagg Bros.*, and an elementary understanding of the distribution of powers in a democratic society make clear that the defendants are in no way performing a traditional governmental function.

In short, citizens gathering signatures to place an initiative measure on the ballot are just not state actors.

II.

Because signature-gatherers are not state actors, there is absolutely no reason for the majority's peregrination through state law in an effort to divine where and when Oregon permits individuals to go about the task of collecting signatures. How Oregon courts limit or do not limit signature-gatherers' right of access to private property is wholly irrelevant to the question before us. However, because I believe in the line of Oregon cases that the majority misconstrues to be of exceptional importance, I feel compelled to point out the majority's errors.

The first reason given in the proposed opinion for rejecting Fred Meyer's claim that the defendants are state actors is that the "Oregon courts have limited the application of *Cargill*." Opinion at 1415. That is incorrect. *Cargill* is one of a series of Oregon cases staking out a right of access to private property for proponents of initiative petitions. *See also Lloyd Corp., Ltd. v. Whiffen (Whiffen I)*, 307 Or. 674, 773 P.2d 1294 (1989); *Lloyd Corp., Ltd. v. Whiffen (Whiffen II)*, 315 Or. 500, 849 P.2d 446, 452 (1993); *State v. Dameron*, 316 Or. 448, 852 P.2d 1285 (1993). Specifically at issue in *Cargill* was whether the state could enforce its trespass laws by prosecuting a defendant who had been gathering signatures for an initiative petition on the privately-owned sidewalk outside the main entrance of a Fred Meyer store. *Cargill*, 786 P.2d at 209. After emphasizing that "[t]he Fred Meyer store at which defendants were arrested is a modern replacement for the town square or park," that "Fred Meyer's invitation to the public was broad and for more than commercial activity," and that there was "no evidence that defendants' activities substantially interfered with Fred Meyer's commercial

activities," the court reversed the defendants' trespassing convictions. *Id.* At 212, 214.

Subsequent Oregon Supreme Court cases strengthened and elaborated upon the principles enunciated in *Cargill*, rather than limiting the case to its facts, as the majority opinion suggests. In *Whiffen II*, the court ruled that, under Article VI, section 1, of the Oregon Constitution, the owner of a large shopping center may be required to allow persons to use privately-owned common areas to seek signatures on initiative petitions.[8] In doing so, it relied heavily on the California Supreme Court's decision in *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899, 153 Cal.Rptr. 854, 592 P.2d 341 (1979), *aff'd*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980), as well as on related constitutional decisions from other state and federal courts. *E.g.*, *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946); *Woodland v. Michigan Citizens Lobby*, 423 Mich. 188, 378 N.W.2d 337 (1985). While concluding that "to prohibit the gathering of signatures on initiative petitions in the common areas of large shopping centers ... would 'impinge on constitutional rights' conferred on the citizens of this state" by the Oregon Constitution, the court also stated that the resulting

---

[8] It was the second time that the Oregon Supreme Court had ruled in the same action. In *Lloyd Corp., Ltd. v. Whiffen (Whiffen I)*, 307 Or. 674, 773 P.2d 1294 (1989)--a case relied upon by the Oregon Court of Appeals in *Cargill*--the court had held that persons have a "subconstitutional" right to seek signatures on shopping center property.

constitutional right of access was subject to reasonable time, place, and manner restrictions. *Whiffen II*, 849 P.2d at 447.

The Oregon Supreme Court again faced these issues in *State v. Dameron*, 316 Or. 448, 853 P.2d 1285 (1993), a subsequent case procedurally equivalent to *Cargill* in which persons seeking petition signatures on the privately-owned sidewalks of a Fred Meyer store had been prosecuted for trespassing.[9] The court affirmed the appellate court's reversal of the defendants' convictions. Reaffirming its holding in *Whiffen II* that persons gathering petition signatures have a state constitutional right of access to certain privately-owned shopping centers, the court nonetheless cautioned against an overly expansive interpretation of that right. It emphasized the fact-specific nature of the inquiry into whether any given shopping center must provide access to such persons, noting that the focus of the inquiry must be on whether the shopping center is large and whether large numbers of persons gather there. *Dameron*, 853 P.2d at 1289 n. 7, 1292 n. 10.

The majority erroneously relies on the Oregon Court of Appeals' statement in an earlier case that "*Cargill* is limited by its facts." Opinion at 1415 (quoting *Fred Meyer, Inc. v. McDonald*, 112 Or.App. 321, 828 P.2d 1054, 1055 (1992), *rev. denied*, 316 Or. 382, 852 P.2d 839 (1993)). Aside from the fact that the *McDonald* statement is quoted out of context, *McDonald* was decided a year prior to the Oregon Supreme

---

[9] On the same day that it issued the opinion in *Dameron*, the Supreme Court also issued its one-sentence affirmance of *Cargill*. *See* 316 Or. 492, 851 P.2d 1141 (1993).

Court's definitive resolution of this issue. In *Whiffen II*, the court unequivocally stated: "We agree with the reasoning of the Court of Appeals in *State v. Cargill*." 849 P.2d at 452; *see also Whiffen II*, 849 P.2d at 470 (Gillette, J., dissenting) ("[c]onsistent with *Cargill*, defendants here also assert--and the majority agrees--that they have a [constitutional] right to gather signatures"). *McDonald* thus tells us little about the Oregon Supreme Court's view as to the breadth of *Cargill*'s holding.

Although courts have cautioned against an overly expansive reading of *Cargill,* they have in no way narrowed its holding. What later opinions have said is that each case *must be considered on its facts,* i.e., that evaluating *what property* that initiative proponents have the right to enter requires an extremely fact-specific inquiry. Nothing in *Cargill* is to the contrary. Accordingly, such statements do not limit *Cargill.* Rather, the principles set forth in *Cargill* remain as strong as ever.

Moreover, even if *Cargill* were narrowly interpreted and only applied, for example, to a few of the largest Fred Meyer stores (there are 40 of them), this would not defeat the logic of Fred Meyer's claim, as the majority opinion suggests. Rather, it would simply serve to limit Fred Meyer's claim to those few stores. Fred Meyer asserts in its brief that because of the state court decision in *Cargill*, the defendants have been granted access to Fred Meyer stores generally. If, however, only certain stores are affected, then that would only mean that Fred Meyer's state action argument would fail as to the other stores. The problem with respect to the affected stores would, of course, be *identical* whether *Cargill* had been limited or not. Accordingly, concluding (erroneously or not) that *Cargill*

has been limited to certain stores in no way brings us any nearer to the ultimate answer in this case.

Most important, the problem with the majority opinion's heavy reliance on the "limiting" of *Cargill* is that it implies that, given an unlimited or invigorated *Cargill* (or a stronger case from another jurisdiction, *see, e.g., Robins v. Pruneyard,* 23 Cal.3d 899, 153 Cal.Rptr. 854, 592 P.2d 341 (1979)), Fred Meyer's claim might be upheld. As explained in part I, such a conclusion would be clearly wrong, given the nature of the initiative process and the controlling Supreme Court precedent. Whether *Cargill* is limited or unlimited, signature-gatherers are simply *not* state actors.

The second reason given in support of the opinion's holding is that Fred Meyer "still has options to restrict petitioning in front of its stores." Opinion at 1415; *see also opinion* at 1416 ("Fred Meyer is incorrect to state that it does not have any recourse to limit the actions of solicitors of ballot signatures"). Specifically, the opinion refers to the fact that the Oregon courts have ruled that store-owners may impose reasonable time, place, and manner restrictions on the activities on signature-getters. *See, e.g., Whiffen II,* 849 P.2d at 454 (1993).

The time, place, and manner argument, like the number of stores argument, is not relevant to the issue of whether the defendants are state actors. It is directed instead to the substance of Fred Meyer's taking claim. The argument is that the infringement of property interests that has allegedly occurred is not as grave as Fred Meyer claims--in other words, that no violation of a constitutionally protected right has

occurred. This fact, however, has nothing to do with whether the defendants are state actors. As one academic commentator has emphasized, the state action inquiry looks solely to "the extent of the challenged action's connection with the state; it does not purport to consider the extent to which the complained-of activity impairs a constitutional value in the particular case." Cole, *Federal and State "State Action": The Undercritical Embrace of a Hypercriticized Doctrine,* 24 Ga.L.Rev. 327, 331 (1990).

When private citizens exercise their fundamental right to seek to have an initiative measure placed on the ballot, they are private individuals and nothing more. Whether they gather signatures outside some or all of Fred Meyer's stores, and whether they do so only in the mornings or twenty-four hours a day, they are not state actors. In short, I strongly disagree both with the overall approach taken in the majority opinion and with the majority's analysis of Oregon law. The majority's interpretation of that state's decisional law not only is erroneous, but it has no relevance to the pivotal question: Whether the defendants are state actors. Because Fred Meyer has not alleged the requisite state action, it has not stated a cognizable section 1983 claim. I would affirm the dismissal on this ground.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

FRED MEYER, INC., a Delaware corporation,	)	
Plaintiff,	)	Court of Appeals No. 92-35067
v.	)	
WILLIAM CASEY HERB L. GRAY, KEN BENJAMIN, MIKE WILEY, LON MABON, PHILLIP Z. RAMSDELL, NO SPECIAL RIGHTS COMMITTEE, OREGON CITIZENS ALLIANCE, JOHN DOES 1 Through 50; JANE DOES, 1 Through 50,	)	District Court No. 91-1320-FR
	)	OPINION
	)	Filed January 10, 1992
Defendants.	)	

Charles F. Hinkle
Gregory R. Mowe
Stoel Rives Boley Jones & Grey
Portland, Oregon 97204
For Plaintiff

Bruce R. McCain
Portland, Oregon
For Defendants

OPINION

FRYE, District Judge:

This is a civil rights action for injunctive relief and damages brought pursuant to 42 U.S.C. § 1983 by plaintiff, Fred Meyer, Inc. ("Fred Meyer"), against the defendants, William Casey, Herb L. Gray, Ken Benjamin, Mike Wiley, Lon Mabon, Phillip Z. Ramsdell, the No Special Rights Committee, and the Oregon Citizens Alliance. The matters before the court are (1) the motion of Fred Meyer for a preliminary injunction (#2); (2) the motion of the defendants to dismiss for failure to join an indispensable party (#10); and (3) the motion of the defendants to dismiss; in the alternative for summary judgment (#11).

BACKGROUND

A. Factual Background

Fred Meyer is a Delaware corporation which operates approximately 40 freestanding, large retail stores in the State

of Oregon. The Oregon Citizens Alliance (the "OCA") is a private educational foundation. The No Special Rights Committee is a political action committee. William Casey is the Multnomah County director of the OCA. Herb Gray solicits signatures for initiative petitions sponsored by the OCA and the No Special Rights Committee. Ken Benjamin is a volunteer with the Multnomah County chapter of the OCA. Mike Wiley is the membership director of the OCA. Wiley also raises funds for the OCA and the No Special Rights Committee. Lon Mabon is the chairman and founder of the OCA. Mabon is also the chairman of the No Special Rights Committee. Phillip Ramsdell is the political director of the OCA. None of the individual defendants are elected officials of the State of Oregon or employees of the State of Oregon. The OCA and the No Special Rights Committee are private entities.

The defendants are organizers and proponents of two initiative petitions. The first initiative for which the defendants are seeking signatures would amend the charter of the City of Portland to restrict the ability of the City of Portland to pass or to enforce laws related to the sexual orientation of any person. The second initiative for which the defendants are seeking signatures would amend the Oregon Constitution in a similar fashion.

Beginning on December 14, 1991, members of the OCA and the No Special Rights Committee entered upon the properties of Fred Meyer without permission from Fred Meyer to solicit the signatures of registered voters in order to qualify the two initiatives for election. Defendants Gray and Benjamin and several Doe defendants stood outside the main entrances

of various Fred Meyer stores asking shoppers to sign the petitions. When the defendants started soliciting signatures, customers of Fred Meyer started complaining and threatening to boycott Fred Meyer stores and to return purchases already made for refunds. Many customers believed that Fred Meyer was sanctioning the petitions by "allowing" the defendants to remain on its properties. Fred Meyer, however, opposes the presence of the defendants on its properties and maintains a consistent policy of forbidding all persons, whatever their causes, from soliciting signatures for initiative petitions on its properties.

In the past, when persons entered the properties of Fred Meyer for the purpose of soliciting signatures for initiative petitions, Fred Meyer would ask them to leave. If they refused, Fred Meyer would call the police and have the petitioners arrested for criminal trespass. This option is no longer available to Fred Meyer following the decision by the Oregon Court of Appeals in *State v. Cargill*, 100 Or.App. 336, 786 P.2d 208, *rev. allowed*, 310 Or. 133, 794 P.2d 794 (1990).

The facts in *Cargill* involve a criminal prosecution for trespass. Defendants were solicitors of signatures on the sidewalks outside the entrances of a Fred Meyer store in the City of Portland. After refusing to obey the directive of Fred Meyer to leave its property, the defendants were arrested and subsequently convicted of criminal trespass in the second degree. The defendants appealed their convictions to the Oregon Court of Appeals.

The Oregon Court of Appeals held that Article IV, section 1 of the Oregon Constitution[10] "prohibits using a criminal prosecution to prevent the people from collecting signatures on initiative and referendum petitions in areas that have replaced traditional forums for the collection of signatures, so long as there is no substantial interference with the owner's use of the property for business or other purposes." *Id.* 100 Or.App. At 348, 786 P.2d 208. Finding that the Fred Meyer store had replaced the traditional forum for the collection of signatures, the court reversed the convictions of the defendants. The State petitioned the Oregon Supreme Court for review. On July 3, 1990, the Oregon Supreme Court granted review. *State v. Cargill*, 310 Or. 133, 794 P.2d 794 (1990). The appeal is still pending.

B. Procedural Background

On December 19, 1991 Fred Meyer filed this action under 42 U.S.C. § 1983 seeking a temporary restraining order, a preliminary injunction, damages, and attorney fees. Fred Meyer argues that it has a right under the First Amendment to the United States Constitution not to be associated with the speech and ideas of the defendants. Fred Meyer further argues that the actions of the defendants amount to a "taking" of its property without just compensation as prohibited by the Fifth and Fourteenth Amendments to the United States Constitution.

---

[10] [The court's footnote at this point set out the text of Article IV, section 1 of the Oregon Constitution, as it appears on pages ___ of this Petition.]

The court denied the motion of Fred Meyer for a temporary restraining order.

On December 20, 1991, Fred Meyer filed a complaint in the Circuit Court of the State of Oregon for the County of Multnomah seeking injunctive relief to prevent the same defendants named herein from gathering signatures on Fred Meyer properties during the holiday shopping season--Thanksgiving Day to January 3, 1992. *Fred Meyer, Inc. v. Casey*, No. 9112-08270 (Multnomah County Cir. Ct. Dec. 20, 1991). On that same day, the Honorable Donald H. Londer, Multnomah County Circuit Court Judge, granted the motion of Fred Meyer for a temporary restraining order thereby prohibiting the defendants from gathering signatures at Fred Meyer stores through January 3, 1992.

On December 27, 1991, the defendants filed a motion in this court to dismiss Fred Meyer's complaint for the failure to join an indispensable party, and a separate motion to dismiss, or in the alternative, a motion for summary judgment. The defendants seek a ruling of this court that the complaint filed by Fred Meyer does not sufficiently allege that the defendants acted under color of state law; that the defendants have absolute legislative immunity from suit; and that Fred Meyer has failed to join an indispensable party, namely the State of Oregon.

APPLICABLE LAW

[1] Fred Meyer has brought this action under 42 U.S.C. § 1983, which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit or equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

42 U.S.C. § 1983 requires Fred Meyer to allege and prove (1) that the defendants acted or are acting under color of the laws of the State of Oregon; and (2) that the defendants deprived Fred Meyer of a right secured by the Constitution or the laws of the United States. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155, 98 S.Ct. 1729, 1732, 56 L.Ed.2d 185 (1978).

ANALYSIS

In its complaint, Fred Meyer alleges that the defendants were and are acting under color of the laws of the State of Oregon because the defendants claim the right to enter the properties of Fred Meyer by virtue of the decision of the Oregon Court of Appeals in *State v. Cargill*, 100 Or.App. 336, 786 P.2d 208, *rev. allowed*, 310 Or. 133, 794 P.2d 794

(199), and that the defendants are engaging in legislative activity authorized by Article IV, section 1 of the Oregon Constitution. Fred Meyer argues that the conduct of the defendants is chargeable to the State of Oregon pursuant to the *Cargill* decision.

[2] The first question for the court to decide is whether the defendants acted or are acting under color of the laws of the State of Oregon. Since it is undisputed that the individual defendants are private citizens and the OCA and the No Special Rights Committee are private entities, the court must determine whether the actions of these private citizens and these private entities are "fairly attributable" to the State of Oregon. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S. Ct. 2744, 2753, 73 L.Ed.2d 482 (1982). If the actions of these private citizens and these private entities are fairly attributable to the State of Oregon, then the requirement that they acted or are acting under color of state law has been satisfied. *See id.* In *Lugar*, the Court enunciated a two-part approach for analyzing the conduct of a citizen or a private entity to determine whether the conduct of the private citizen or private entity could be fairly attributable to a State. "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible.... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.*

[3] Under the laws of the State of Oregon, the defendants are entitled to solicit signatures on the properties of Fred Meyer under the authority of the initiative and

referendum provisions of the Oregon Constitution without the fear of arrest. This is sufficient to satisfy the first part of the test set forth in *Lugar*. However, it is not sufficient, by itself, to fairly characterize the conduct of the defendants as the conduct of state actors. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978) (conduct by private party pursuant to statute, without more, not sufficient to characterize party as a state actor). Thus, the court must examine part two of the *Lugar* test: whether the defendants may fairly be said to be state actors. *Lugar*, 457 U.S. at 937, 102 S.Ct. at 2753.

The defendants are not state officials or employees. They did not act with the aid of or together with state officials or employees in soliciting signatures on the properties of Fred Meyer.

The defendants were performing a function which has traditionally been a state prerogative. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 842, 102 S.Ct. 2764, 2771, 73 L.Ed.2d 418 (1982). The defendants, in soliciting signatures in order to place an initiative on the ballot, are participating in the process of enacting law. The enactment of laws is a traditional state function. In the State of Oregon, however, the legislature does not have the *exclusive* power to enact laws. *See id.* (defendants may be fairly characterized as state actors if they perform "a function which has been traditionally the *exclusive* prerogative of the State" (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974) (emphasis in *Rendell-Baker*)). Since 1902, the Oregon Constitution has reserved to the people of the State of Oregon the powers of initiating and referring to

the voters of the State of Oregon proposed legislation. Although the acts of the defendants in participating in the legislative process serve a public function, such service does not transform their conduct into state action. *See id.*

RULING

Fred Meyer has failed to show that the defendants were acting under color of state law, and, consequently, Fred Meyer has not stated a claim under 42 U.S.C. § 1983. Accordingly, the motion of the defendants to dismiss; in the alternative for summary judgment (#11) is granted. The motion of Fred Meyer for a temporary restraining order/preliminary injunction (#2) and the motion of the defendants to dismiss for failure to join an indispensable party (#10) are deemed moot.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRED MEYER, INC., a Delaware corporation,	)	Court of Appeals No. 92-35067
Plaintiff-Appellant,	)	District Court No. CV-91-1320-FR
v.	)	ORDER
WILLIAM CASEY; HERB L. GRAY; KEN BENJAMIN; MIKE WILEY; LON MABON; PHILLIP Z. RAMSDELL, NO SPECIAL RIGHTS COMMITTEE; OREGON CITIZENS ALLIANCE; JOHN DOES 1 Through 50; JANE DOES, 1 Through 50,	)	
Defendants-Appellees.	)	

BEFORE: REINHARDT, BRUNETTI, and FERNANDEZ, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

FILED: November 17, 1995.